In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-85

DEWEY M. RUMFELT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Eastern District of Illinois, petitioner was convicted of attempting to enter a federally insured bank, in violation of 18 U.S.C. 2113(a). He was sentenced to imprisonment for eight years. The court of appeals affirmed (Pet. App.).

At about 1:00 p.m. on February 29, 1968, one John Aldrich, as he was leaving a grocery store in Alto Pass, Illinois, was confronted by a masked man standing near a 1964 Oldsmobile in front of the bank next door. The man, who was wearing two jackets and a ski mask, pointed a "rifle" at Aldrich and told him, "Get in the bank." Aldrich walked to the bank door and

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tried to open it, but it was locked for the lunch hour. The man moved around behind Aldrich and looked in the bank window; he then told Aldrich to get out of town. Aldrich did so but, before leaving, he told someone to call the police (Tr. 2–4).[1]

Shortly thereafter, a state trooper, who learned of the occurrence over the car radio, saw a 1964 Oldsmobile approaching him at a high rate of speed about ten and a half miles outside of Alto Pass. The trooper pulled to the side of the road; as the approaching car drew abreast, the driver reached to his right and picked up a carbine, which he pointed in the general direction of the trooper. The trooper got a full view of the face of the man, whom he identified as petitioner, and immediately made a U-turn and followed the Oldsmobile (Tr. 36–40).

Approximately two miles down the road, petitioner suddenly brought his car to a stop on the right shoulder; the trooper saw him run into a nearby woods, carrying the carbine. A corduroy jacket and a ski mask were left behind in the abandoned car (Tr. 40–45). The trooper called for assistance, and the woods, which were surrounded on three sides by water, were searched by other officers and observed by a police airplane. About three or four o'clock that afternoon, petitioner emerged from the woods approximately one quarter of a mile from the abandoned Oldsmobile and was placed under arrest (Tr.

[1] "Tr." refers to the transcript of proceedings in the trial court, a copy of which is being lodged with the Clerk of this Court.

82–85). Aldrich testified at trial that the firearm, the jacket and mask and the car were similar to those he had observed when confronted outside the bank (Tr. 4–5, 12–13).

Petitioner contends here that the trial court erred in giving the following instruction to the jury (Tr. 160–C):

> Three essential elements are required to be proved in order to establish the offense charged in the indictment.
>
> First: The act or acts of taking or attempting to take, from the person or presence of another, money belonging to or in the care, custody, or control, management or possession of a bank, as charged;
>
> Second: The act or acts of taking or attempting to take such money by force or violence, or by means of intimidation;
>
> Third: Doing such acts knowingly, wilfully and unlawfully.
>
> As stated before, the burden is always on the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.[2]

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[2] An instruction in substantially this form was offered by the government (Tr. 149–150). The following colloquy with regard to this proposed instruction took place (Tr. 151):

> Mr. Schooley. This particular instruction, your Honor, is not in keeping with the indictment as drafted. The indictment alleges he unlawfully attempted to enter the Farmers State Bank with the intent to commit a felony, to-wit, to take money therefrom. The instruction sets out the act or acts of attempting to take, from the person or presence of another, money belonging to or in the care,

The argument was not made in the court of appeals [3] and therefore is not properly before this Court. At all events, the claim is insubstantial in the circumstances of this case and does not warrant further review by this Court.

1. Petitioner asserts that the quoted instruction is adapted to prosecutions under the first paragraph of Section 2113(a), proscribing the taking, or attempted taking, of money from a bank "by force and violence, or by intimidation," whereas he is charged only with violating the second paragraph of that section, proscribing entry, or attempted entry into a bank "with intent to commit * * * any felony" therein. Whatever the merit to petitioner's argument, however, it is plain on the record of this case that use of this instruction by the court, even if technically erroneous, was not in any way prejudicial to petitioner. See *Kotteakos* v. *United States*, 328 U.S. 750; cf. *Chapman* v. *California*, 386 U.S. 18, 24.

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custody, or control, management or possession of a bank. The third element is: "Doing such acts wilfully." It should be, "knowingly, wilfully and unlawfully."

Mr. ARBETMAN. Your Honor, this instruction sets out the elements as defined in the statute.

The COURT. The indictment says, "knowingly, wilfully and unlawfully." Do you think that needs to be put in here?

Mr. ARBETMAN. We would have no objection to that.

The COURT. I am amending that by making it, "Doing such acts knowingly, wilfully and unlawfully."

Mr. SCHOOLEY. I still have the same objection to the first part.

[3] In the court of appeals, petitioner urged insufficiency of the evidence to support his conviction and raised several trial errors. His contentions were fully answered by the court below (Pet. App. A4–A7) and have not been reasserted in this petition.

Petitioner was charged with "knowingly, wilfully and unlawfully attempt[ing] to enter Farmers State Bank * * * with the intent to commit * * * a felony * * * to wit, to take therefrom money which was in the care, custody, control, management and possession of said bank; all in violation of Section 2113(a), Title 18, United States Code" (Pet. 4). As this Court stated in *Prince* v. *United States,* 352 U.S. 322, 328: "The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal." See also *United States* v. *Schaar,* 437 F. 2d 886 (C.A. 7).

Under the trial court's instruction, the jury admittedly was advised that to return a verdict of guilty it must find first that petitioner attempted to take money from the bank, not that he attempted to enter the bank with the intent to take money. But, to find the former—as the jury apparently did in this case—necessarily required a finding that petitioner had the requisite intent with respect to the latter.

Here, the evidence of petitioner's intent to steal was abundant. He was standing outside the bank, armed and masked, at the time that Aldrich came out of the grocery store next door. On seeing Aldrich, petitioner turned his gun on him, apparently considering that his efforts would be jeopardized if Aldrich were free to sound an alarm, and ordered Aldrich to "get in the bank" (Pet. App. A2). On finding that the bank door was locked, petitioner instructed Aldrich to get out of town. He then jumped into his Oldsmobile and drove

off at a high rate of speed. When the police gave chase, petitioner pulled off the road and fled on foot into a nearby woods, still carrying the gun he had used on Aldrich. From these facts, the jury could properly conclude that petitioner had the intent to commit armed robbery of the bank required by the statute, even if we assume *arguendo* that it could not have found that his actions were sufficient to constitute an actual attempt to take bank money.

It is argued, however, that the language used by the trial court to explain the second element of an offense under paragraph 1 of Section 2113(a)—*i.e.*, attempting to take such money by force or violence, or by means of intimidation—misled the jury to believe that proof of petitioner's intimidation of Aldrich (a stranger) would alone be sufficient to show "an attempt [by petitioner] to enter the bank" (Pet. 5). Had petitioner merely turned his gun on Aldrich and directed him to leave town silently if he didn't want to be shot, we would tend to agree with petitioner; such intimidation would clearly not be adequate evidence of an attempted bank entry. But that is not this case. Here Aldrich was specifically ordered to enter the bank and was forced at gun point to attempt to open the bank door. In these circumstances, Aldrich's efforts to get into the bank were legally equivalent to petitioner himself trying to open the door. Thus, the "intimidation" of Aldrich—which is not contested by petitioner—was in this case alone sufficient to establish an attempted entry by petitioner in violation of paragraph 2 of Section 2113(a).

We do not disagree with petitioner that the trial

court's instruction to the jury in this case improperly focused on the wrong paragraph of Section 2113(a). The court's use of the word "intimidation," however, simply imposed an additional burden on the government not required by the indictment, which charged petitioner only with an attempt to enter the bank with unlawful intent. Since the jury necessarily had to find both elements of the offense charged—*i.e.*, attempted entry and intent to commit a felony—before it could return, under the court's instruction, a verdict of guilty of the charge of attempt to take money in the custody or control of a bank (whether or not by force, violence or intimidation); and since the evidence in this case amply supports the verdict of guilty *as charged*, there is no basis here for a claim of prejudice.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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